

**Fair Political Practices Commission**  
**MEMORANDUM**

**To:** Chairman Johnson and Commissioners Hodson, Huguenin, Leidigh, and Remy

**From:** Hyla P. Wagner, Senior Commission Counsel  
Scott Hallabrin, General Counsel

**Subject:** Gifts to an Agency - Prenotice Discussion of Regulation 18944.2

**Date:** February 29, 2008

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**Proposed Commission Action:** Approve for public notice the repeal and readoption of Regulation 18944.2 concerning donations to state and local agencies that result in a possible gift to a public official in the agency.

**Background:** From Eli Broad's gift of \$23 million to Los Angeles Charter Schools to a park bench given in memory of a crossing-guard who worked in a Bay Area community for 33 years, private individuals, foundations, and businesses regularly give donations to government programs they support. As one might expect, parks departments, hospitals, state colleges and universities, and libraries are frequent recipients of gifts. These gifts help public agencies stretch resources in a time of fiscal constraints.

Under the Act, gifts to a public official from a third party are generally limited to \$390 per year per donor, and the official must report any gifts received of \$50 from a single source on his or her yearly statement of economic interests. Gifts of \$390 or more in a 12-month period may also disqualify the official from making a decision affecting the donor.

The Act defines a gift as: "any payment that confers a *personal benefit* on the recipient to the extent that consideration of equal or greater value is not received and includes a rebate or discount in the price of anything of value unless the rebate or discount is made in the regular course of business to members of the public without regard to official status." (Section 82028(a), emphasis added.) Dating back to the *Stone* Opinion in 1977, the Commission has recognized that there are circumstances where a service or benefit provided to an official actually benefits the state or a public agency, and should be considered a gift to the agency, not a gift to the public official reportable on his or her statement of economic interests and subject to gift limits under the Act.

The Commission adopted Regulation 18944.2, the exemption for gifts to an agency in 1994. Existing Regulation 18944.2 provides that a payment, which is a gift as defined by Section 82028, will be considered a gift to a public agency and not the individual official if the following four requirements are met:

- (1) the agency receives and controls the gift;
- (2) the payment is used for official agency business;
- (3) the agency, not the donor, determines the officials who shall use the payment; and
- (4) the agency memorializes the payment in a written record.

Gifts to an agency that we have analyzed under this regulation run the gamut from free office space for settlement conferences given to the New Motor Vehicle Board by litigants, to payments for transportation, lodging and meals for a delegation of 15 officials selected by the California High-Speed Rail Authority, to inspect the high speed train facilities in Japan, paid for by Japanese train manufacturers.

It is important to note that Regulation 18944.2 is not the statutory authority for a state or local agency to accept a gift. It simply provides that a gift that might otherwise be considered a reportable or limited gift to an official will be considered a gift to an agency under certain circumstances. State agencies are authorized by law to accept gifts, subject to specified restrictions and procedures.<sup>1</sup> Many cities, counties and local agencies also have gift acceptance authority and policies.

Further, because “personal benefit” was added to the Act’s definition of gift, Regulation 18944.2 only applies when a “personal benefit” to an official is involved. Many gifts to agencies do not involve a personal benefit to an official. For example, the Clerk of the Los Angeles County Board of Supervisors states that they get very few gifts to the agency, maybe one or two every other month. Mostly he deals with reporting of gifts that the Board of Supervisors has to acknowledge, but there is no personal benefit to a public official involved, so Regulation 18944.2 is not implicated.

**Proposed Regulation:** Because staff is proposing numerous revisions to Regulation 18944.2, we are recommending repeal of the current regulation (see Attachment 2) and adoption of a new regulation (see Attachment 1). The amendments call for improved disclosure of gifts to state and local agencies, clarify that the agency head must approve gifts to an agency, and add restrictions on payments for travel accepted by an agency under the regulation.

At the outset, the changes specify that the “agency head” must approve a gift to an agency. The existing regulation required the “agency” to control the payment and determine who will use it, leaving some ambiguity as to who was responsible.

**1. Improved Disclosure of Gifts to Agencies.** Until now, there has been no practical way of tabulating or examining gifts to agencies accepted under this regulation. The amendments update the disclosure of gifts to an agency. Under the existing regulation, an agency is required to document its receipt of gifts in a memo kept in the agency’s own files in the case of a state agency. Gifts to state agencies under the proposed regulation would be reported to the FPPC. A state agency or a local agency, if it maintains a website, would be required to post the information on that website. Gifts to local agencies would be reported either to the local ethics commission or to the SEI filing officer and could be posted publicly. Further,

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<sup>1</sup> See Government Code Secs. 11005(b), 11005.1 and 16302, and State Admin. Manual Sec. 8634.

the amendments provide that the agency's written record of the gift is a public record subject to inspection and copying under Section 81008(a).

The amendments tell the agency what information to report about the gift including: a description of the gift, the date received, the amount, the name and address of the donor, and the agency's use of the payment. If a gift to an agency is made up of donated funds raised for the purpose of making a gift to an agency, the names and amounts given by the underlying donors of the funds will be disclosed.

## **2. New Restrictions on Gifts of Travel Payments to an Agency.**

**a. State or Local Elected Officers.** The amendments propose that an agency may not accept a payment for travel for a state or local elected officer under the regulation. This prohibition is a clear new rule that would eliminate most of the problematic situations involving gifts to an agency that we encounter, particularly on the local level. The most difficult questions arising in the gift to agency area involve payments for travel that are ostensibly "not designated" for a particular official, but end up going to the mayor or top city council members. City attorneys and our analyses are forced to split hairs to determine whether these gifts to an agency *do or do not* comply with the requirements of Regulation 18944.2 that the agency control the use of the payment, and that the donor does not designate the official who will use the travel payment.

If adopted, state and local elected officers could no longer receive travel payments as a gift to their agency under Regulation 18944.2, *not reported* on their statement of economic interests. They may, however, still receive travel payments under other provisions of the Act, which *are reported* on the official's statement of economic interests and subject to applicable limits. For example, Section 89506 permits an official to accept travel payments from a government, a government agency, a foreign government, or a 501(c)(3) organization that are related to a legislative or governmental purpose or public policy; these payments must be reported on the elected official's statement of economic interests but are not limited in amount. The Act also permits an official to receive payments for travel to give a speech. (Section 89506(a)(1) and Regulation 18950.1.) In addition, an elected official's travel that is directly related to a political, legislative or governmental purpose may be paid for with campaign funds. (Section 89513.) And, of course, travel by an official representing his or her agency on official business that is paid for by the agency, is neither income nor a gift to an official under the Act. (Sections 82030(b)(2) and 89506(d)(2).) However, certain travel payments to elected officials would be curtailed by this change. For example, direct payments by a private business for city council members to go see a manufacturing plant or port facilities in another country could no longer be accepted as a gift to an agency under Regulation 18944.2.

**b. Travel Payments Not to Exceed Agency Reimbursement Rates.** The amendments also provide that an agency may not accept a payment for travel that exceeds amounts in the agency's policy on reimbursement rates. State agencies' travel policies are generally based on the published state per diem rates. If an agency has no policy it may use the IRS rates for reimbursement of these expenses contained in Publications 463 and 1542.

In response to a question raised at the interested persons meeting, we note that entertainment or recreational activities provided to an official in addition to, or incident to, travel accepted as a gift to an agency are separate gifts to the official. The value of these gifts must be reported on the official's statement of economic interests and may be limited, unless otherwise subject to an exception under the Act or Commission regulations.

**c. Preauthorization for Travel.** The regulation also requires preauthorization for agency personnel traveling on private funds given to the agency. The agency head or his or her designee must authorize the travel and select the official before any costs are incurred for the travel and before the official commences travel. Preauthorization for travel strengthens the ability of the agency to control the use of the gift and select the personnel who will use a travel payment, and is a standard requirement for many types of travel. For example, San Francisco already requires pre-authorization for travel accepted by city officials as a gift to an agency.<sup>2</sup> The agency may use an existing travel form for this preauthorization, such as the state STD 257 Out-of-State Travel Approval Request form, or its own internal written record.

**d. Third Party May Pay Airline or Hotel Directly.** When this regulation was considered by the Commission for amendment last year, we were addressing the issue of whether a gift to an agency for travel may be paid by a third party to an airline or hotel directly, or whether funds must physically be routed through the agency to pay for the travel. As proposed, the regulation permits a third party to pay the hotel or airline directly. It is staff's view that the existing regulation encompasses the constructive receipt of goods or services, meaning the control over property without its actual possession or custody.<sup>3</sup>

Many gifts received by agencies under this regulation are in-kind gifts of goods or services and it is not always practical to require that the gift be in the agency's physical possession. For example, if an individual wanted to donate new playground equipment to low-income schools, the Board of Education would want to determine what schools the equipment should be delivered to, but not to physically receive the equipment. Similarly, allowing a third party to pay the airline or hotel directly reflects the realities of ticketing and reserving travel. The regulation clarifies that this is permissible by removing the word "receives" from the agency control prong of the regulation, and by specifically referring to the definition of payment in Section 82044, which encompasses money, property and services. Safeguards have been added requiring the agency to select the personnel who will travel and provide prior written authorization for travel *before* travel commences and before costs are incurred (i.e., before a third party puts an official's name on a ticket and purchases it.)

**3. Tickets.** Regulation 18944.1 specifically covers passes and tickets given to an agency. At times, however, passes or tickets that do not fit within the requirements of Regulation 18944.1 are accepted by agencies under the more general Regulation 18944.2. The amendments provide that an agency may only accept passes or tickets if they fit within the requirements of Regulation 18944.1; they do not get a second attempt at analyzing tickets under Regulation 18944.2.

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<sup>2</sup> See San Francisco Ethics Commission Form SFEC 3.216(d).

<sup>3</sup> For more discussion see staff memorandum by Brian Lau to the Commission on Regulation 18944.2 for the January 12, 2007, Commission meeting, at <http://www.fppc.ca.gov/Agendas/01-07/18944-2memo.pdf>.

**Staff Recommendation:** Staff recommends that the Commission approve for public notice the repeal and adoption of Regulation 18944.2.

Attachments: 1 – Proposed Regulation 18944.2  
2 – Repeal Regulation 18944.2